Nebraska Law Review

Volume 54 | Issue 1 Article 11

1975

Due Process and Prejudgment Creditors' Remedies: *Sniadach* and *Fuentes* Revisited: *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974)

Penny Berger
University of Nebraska College of Law, pennyberger@gmail.com

Note

Due Process and Prejudgment Creditors' Remedies: *Sniadach*[1] and *Fuentes*[2] Revisited

Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

Two Supreme Court decisions, *Sniadach v. Family Finance Corp.*[3] in 1969, and *Fuentes v. Shevin*[4] in 1972, appeared to herald a modern revolution in pre-judgment creditors' remedies: their message—unless preceded by notice and an opportunity to be heard, such remedies violated the due process clause of the fourteenth amendment. For many observers, however, it appeared the revolution ended with the Court's decision in *Mitchell v. W.T. Grant Co.*[5]

Petitioner Lawrence Mitchell bought a refrigerator, stove, stereo and washing machine from respondent W. T. Grant in New Orleans. In February, 1972, the store filed suit alleging an overdue and unpaid balance on the purchase price of $547.17. The complaint further alleged that the store had a vendor's lien on the goods[6] and asked that a writ of sequestration[7] be issued pending the outcome of the suit. Pursuant to statute,[8] the request for the writ contained

1. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).
2. Fuentes v. Shevin, 407 U.S. 67 (1972).
3. 395 U.S. 337 (1969).
4. 407 U.S. 67 (1972).
5. 416 U.S. 600 (1974). "*Mitchell* marks a substantial retreat from the principles enunciated in *Sniadach* and *Fuentes*." Hobbs, *Mitchell v. W. Grant Co.: The 1974 Revised Edition of Consumer Due Process*, 8 CLEARINGHOUSE REV. 182 (1974).
6. Louisiana, a civil law state, does not recognize the validity of the common law conditional sales contract.
7. LA. CODE CIV. PRO. ANN. art. 3501 *et seq.* (West 1961). In Louisiana, the sequestration statute is the functional equivalent of the common law replevin procedure.
8. A writ of attachment or of sequestration shall issue only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appear from specific facts shown by the petition verified by, or by the separate affidavit of, the petitioner, his counsel or agent.

   The applicant shall furnish security as required by law for the payment of the damages the defendant may sustain

sworn affidavits that the facts alleged in the complaint were true,[9] and that the store had reason to believe Mitchell would "encumber, alienate, or otherwise dispose of the merchandise;"[10] also it was accompanied by a security bond for twice the amount of the allegedly unpaid balance. The Judge of the City Court of New Orleans signed an order for the writ, and on February 5, 1972, with neither prior notice to Mitchell, nor opportunity for him to be heard, a court constable seized the goods. Thus, upon an ex parte "showing" of statutory grounds, and the posting of bond, the store forced the goods out of Mitchell's hands and into the custody of a court official.

The Louisiana courts upheld the constitutionality of the sequestration statute against Mitchell's claims that it violated his right to due process of the law.[11] The United States Supreme Court affirmed the validity of the ex parte procedure.

The Court's apparent disregard for the trend established in *Sniadach* and *Fuentes* disappointed those who expected that further development in the area of pre-judgment remedies would be couched in the language and rationale of those two cases. While *Sniadach* and *Fuentes* prohibited summary deprivations of "significant property interests,"[12] *Mitchell* reestablishes the more tradi-

---

when the writ is obtained wrongfully.
LA. CODE CIV. PRO. ANN. art. 3501 (West 1961).

9. *Id.*

10. When one claims the ownership or right to possession of property, or a mortgage, lien, or privilege thereon, he may have the property seized under a writ of sequestration, if it is within the power of the defendant to conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action.
LA. CODE CIV. PRO. ANN. art. 3571 (West 1961).

11. In its decision, the Louisiana Supreme Court stressed both the debtor's power over the goods in his possession and the fact that the conditional sales contract contained a constitutionally valid waiver of right to a pre-trial hearing. It would therefore seem that the Louisiana court believed the facts of the *Mitchell* case brought it within the exceptions to the rule of pre-seizure hearing allowed under the *Fuentes* decision. *See* Fuentes v. Shevin, 407 U.S. at 81. This decision has been criticized in Comment, *Fuentes v. Shevin: Its Treatment by Louisiana Courts and Effect upon Louisiana Law*, 47 TUL. L. REV. 806 (1973). The author notes that the danger to the creditors' goods is no greater under sequestration statutes with pre-seizure notice and hearing than under comparable replevin statutes with those constitutional safeguards. In addition, the author concludes that the implied-in-law knowledge relied on by the Louisiana court does not meet the standard for acceptable waivers set forth in *Fuentes*. In fact, the Supreme Court approved the Louisiana statute for entirely different reasons than those given by the state courts.

12. The importance of *Sniadach* and *Fuentes* lay in their recognition that "mere possessory rights" might merit constitutional protection. 395

tional articulation, analysis, and resolution of problems stemming from those interests.

Although not specifically repudiating the principle of *Sniadach* and *Fuentes*, that "mere possession and the right to use of personal property constitute protected interests under the fourteenth amendment,"[13] the Court in *Mitchell* nevertheless seems to have retreated from *Fuentes*' focus on the rights and needs of the debtor.

> [Mitchell's] interest in the property, until the purchase price was paid in full, was no greater than the surplus remaining, if any, after foreclosure and sale of the property in the event of his default and satisfaction of outstanding claims . . . . The interest of Grant, as seller of the property and holder of the vendor's lien, was measured by the unpaid balance of the purchase price.[14]

By measuring the relative property interests in this way, an analysis eschewed in *Sniadach* and *Fuentes*, the Court sets the stage for a return in *Mitchell* to its traditional balancing test for determining the content of procedural due process. The abandonment of *Fuentes*' strict rule allows a case by case approach while increasing the chances that pre-hearing seizures will be approved.

The full import of *Mitchell* can only be appreciated by recalling that *Fuentes* created a standard of "extraordinary situation" that must be present to "justify postponing notice and opportunity for a hearing."[15] Although Justice Stewart enumerated three constitutional cases[16] in which the general rule could be relaxed, the thrust of *Fuentes* was to circumscribe strictly the use of preseizure hearings. Under *Fuentes*, the mere existence of a creditor's ordinary security interest would not qualify as a "truly unusual situation." The rule of *Fuentes* reflected Justice Stewart's belief that the dangers of mistaken and arbitrary deprivations of property[17] in the consumer credit context outweighed the danger

---

U.S. at 342. *See* 407 U.S. at 86-87. The *Mitchell* Court questioned neither their lowered threshold determination nor the broadened scope of constitutionally protectible interest that has developed in their wakes. *See also* Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

13. 407 U.S. at 85.
14. 416 U.S. 600, 604 (1974).
15. 407 U.S. at 90.
16. These were: (1) seizure must be directly necessary to secure an important governmental interest; (2) there must be specific need for very prompt action; (3) the state must keep strict control over its monopoly of force.
17. Justice White never takes issue with Justice Stewart on this point; it is not clear, however, that the two men mean the same thing when they refer to "mistake." Justice Stewart's dissent in *Mitchell*, as well as his majority opinion in *Fuentes*, indicates that "mistaken and arbitrary deprivations of property" include those cases in which the debtor

of possible harm accruing to the goods while in the possession of the debtor.

The rationale of Justice White's dissent in *Fuentes* formed the foundation for his opinion in *Mitchell*: "[T]he creditor has a 'property' interest as deserving of protection as that of the debtor."[18] According to Justice White's logic, due process guarantees a rational accomodation of these competing interests, an accommodation that can only be minimally standardized. At some point the debtor must have an opportunity to be heard on the merits of the claim, but that point lends itself neither to precise definition nor to a rule demanding strict adherence. For Justice White, due process consists in weighing the possible harm done to a debtor through loss of the property pending trial against the state's interests in discouraging extra-judicial remedies and protecting the creditor's security interest.[19] Since Justice White believes that the impact on the debtor of this deprivation is less than the possible loss to the creditor, his due process naturally admits of ex parte seizures in a wide variety of circumstances.

Despite the fundamental divergence between the two cases, Justice White declines to characterize *Mitchell* as overruling *Fuentes*. Instead, he distinguishes the cases in ways that emphasize the accommodationist role of the state. Contending *Mitchell* differs from *Fuentes*, Justice White points out that the Louisiana statute[20] allowed the debtor to "immediately have full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor- or court-supervised possession."[21] Thus *Mitchell*, far from holding that due process will be satisfied by summary seizures, merely reiterates Justice White's position that the fourteenth amendment requires pre-trial but not necessarily pre-deprivation hearings.[22] Although *Mitchell* permits

---

would be likely to prevail on the merits. Justice White views "mistaken deprivations" as those instances where there was no default or where no valid security interest exists in the property. If this is the case, a much lower standard would protect debtors against "mistaken deprivations" during pretrial hearings.

18. Fuentes v. Shevin, 407 U.S. 67, 102 (1971) (White, J., dissenting). *Compare* Mitchell v. W.T. Grant Co., 416 U.S. 600, 604 (1974).
19. 416 U.S. at 607. The positions of both Justice Stewart and Justice White probably stem from their differing beliefs concerning the ultimate outcome of the average trial.
20. LA. CODE CIV. PRO. ANN. art. 3506 (West 1961).
21. 416 U.S. 600, 610 (1974). Justice White also noted with disapproval that Mitchell did not avail himself of this right to a pre-trial, albeit post-seizure, hearing. Mitchell's failure to move for dissolution of the writ weakened his argument as far as Justice White was concerned regarding the severity of the deprivation he was forced to suffer as a result of the seizure.
22. *See also* Arnett v. Kennedy, 416 U.S. 134 (1974). At least one state

delaying the hearing, it stops short of declaring it unnecessary. Whatever Justice White's intent in distinguishing the statutory procedures in *Fuentes* and *Mitchell*, the result will be to focus the controversy on the content of the pre-trial hearing.

The *Mitchell* opinion contains many examples of Justice White's search for significant factual differences between the two cases. In *Fuentes*, the Court worried about the ability of creditors to regain possession of the property through a purely ministerial act: the pro forma approval of a pro forma allegation by a court clerk. In the parish where *Mitchell* arose, practice dictated that a judge, rather than a clerk of the court, receive application for the writ. In addition, the writ had to be accompanied by supporting allegations and documentation. The Court also distinguished *Mitchell* from *Fuentes* based on the statutory requirements that creditors must meet in order to force issuance of the writ. The Court held the Florida and Pennsylvania statutes unconstitutional because they did not require the creditor to make a "convincing showing" before the seizure that he was, indeed, entitled to the property; the laws demanded no more than a "bare assertion of the party seeking the writ that he is entitled to one."[23] Under the Louisiana statute, however, the creditor is required to make specific allegations of fact, supported by affidavits, that grounds exist for issuing the writ. As a result of these "safeguards," Justice White believed that Mitchell, unlike Fuentes, "was not at the unsupervised mercy of the creditor and court functionaries."[24]

Closer examination of the Louisiana procedure, however, discloses very little extra protection for debtors. Although the Louisiana statute authorizes the writ "only when the nature of the claim and the amount thereof, if any, and the grounds relied upon for the issuance of the writ clearly appears from specific facts shown by verified petition of affidavit," in practice the creditor need show no more than was required under the statutes in *Fuentes* to seize the property. Under the Louisiana statute, grounds for sequestration exist as long as the debtor has the power "to con-

---

court has already so interpreted the *Mitchell* holding. In Garcia v. Krause, 380 F. Supp. 1254 (S.D. Tex. 1974), the court struck down the Texas sequestration statute in part because it did not provide for an immediate post-seizure, pre-trial hearing.

23. 407 U.S. at 74.

24. 416 U.S. at 616.

> The approval of a writ of sequestration is not, as petitioner contends a mere ministerial act. "Since a writ of sequestration issues without a hearing, specific facts as to the grounds relied upon for issuance must be contained in the verified petition in order that the issuing judge can properly evaluate the grounds."

416 U.S. 616 n.12 (1974).

ceal, dispose of or waste the property or the revenues therefrom, or remove the property from the parish, during the pendency of the action."[25] To satisfy the requirements for issuing the writ, therefore, the creditor need only allege that the debtor has the property in his possession, since mere possession will always give the debtor the "power" over the property that triggers the right to sequestration. Thus, despite Justice White's explicit denial,[26] the Louisiana procedure appears to operate in much the same way as those struck down in *Fuentes*. The impression of similarity is enchanced by the fact that the allegations supporting the request for the writ in *Mitchell* were contained on a form affidavit which required only that the creditor fill in the empty blanks.

Although in *Mitchell*, the court officer responsible for reviewing the petitions and for issuing the writ in Orleans parish was a judge, the Louisiana statute provides that the writ may be signed by a clerk of the district court.[27] In all other parishes in the state, the clerk of the court is, in fact, the official involved in the procedure. Given Justice White's reliance on the presence of the judge to protect Mitchell from the "unsupervised mercy of the creditor and the court functionaries,"[28] the holding in *Mitchell* cannot logically apply to any other parish in the state. The inquiry into whether there is meaningful judicial supervision is central to the problem; Justice White's approach, however, stresses form over substance by focusing on the title of the official who signed the writ rather than on the sufficiency of proof required to support the allegations contained in the affidavits.

No doubt part of the reason for Justice White's analysis lies in his probable reluctance to overrule a case only two years old. In addition, he was forced to piece his decision out of incomplete cloth; neither counsel in the *Mitchell* case appears to have presented the Court with a precise factual explanation of the seques-

25. LA. CODE CIV. PRO. ANN. art. 3571 (West 1960).

26. The dissenters, Justices Stewart, Marshall, and Douglas, disagreed with Justice White, calling the procedure in *Mitchell* merely "pro forma."

> The Louisiana affidavit requirement can be met by any plaintiff who fills in the blanks on the appropriate form documents and presents the completed forms to the court. Although the standardized form in this case called for somewhat more information than that required by the Florida and Pennsylvania statutes challenged in *Fuentes*, such *ex parte* allegations "are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights."

416 U.S. at 632 (*quoting* Fuentes v. Shevin, 407 U.S. 67, 83 (1972).

27. LA. CODE CIV. PRO. ANN. art. 282-3 (West 1960).

28. 416 U.S. at 616.

tration procedure.[29] Thus, in the absence of any evidence to the contrary, Justice White was free to indulge his presumption that the allegations of danger to the property in the pro forma affidavits were true.[30] Finally, Justice Stewart's failure in *Fuentes* to define clearly the content of procedural due process allows Justice White to substitute his own definition in *Mitchell* and reach different results.

In *Fuentes*, Justice Stewart implied that the due process clause guarantees an adversary hearing in which the creditor must show, at a minimum, a right to pre-judgment relief and a prima facie case on the merits. While Justice Stewart's meaning was not entirely plain, he surely intended the pre-trial hearing to go further than a showing of default.[31] Indeed, at least two authors have concluded that until *Mitchell, Fuentes* and the other cases considering due process allowed "all issues [to] be raised at a hearing for preliminary relief which are permitted by the substantive law of the state. In the consumer credit context, these issues will typically consist of all possible personal defenses which justify non-payment as a matter of contract law."[32]

In *Mitchell*, however, Justice White reduces the content of the hearing substantially from that envisioned either by the *Fuentes* Court or by the commentators after *Fuentes*:

> On the contrary, it seems apparent that the seller with his own interest in the disputed merchandise would need to establish in

29. *See* Summary of Arguments Presented to the Court, Supreme Court Proceedings, 42 U.S.L.W. 3345 (U.S. Dec. 11, 1973).

30. By the same token, of course, counsel's unfamiliarity with the facts also allowed Justice Stewart to indulge the opposite presumption.

31. The opinion suggests that Mrs. Fuentes could have prevailed at the hearing had she shown either (1) no unpaid balance owing; or (2) other "valid" defenses. 407 U.S. at 87. And at the end, Justice Stewart pointed out that hearings must determine the "validity, or at least the probable validity, of the underlying claim . . . ." *Id.* at 97.

32. Clark & Landers, *Sniadach, Fuentes, and Beyond: Creditor Meets the Constitution*, 59 VA. L. REV. 355, 408 (1973). Soia Mentschikoff points out that in many cases, the creditor's real injury may not give rise to a valid defense to withholding payments or at best is severely limited in ways that an unsophisticated purchaser would not likely know about.

> [U]nder the Code in cases of non-payment installment, the debtor's right to continued use of the goods is limited to situations where he has not elected the remedy of voiding the debt as a result of fraud, unconscionability or revocation of acceptance for material breach of warranty. This defense can, of course, only be asserted against the security party-seller and, in some jurisdictions, against his assignees.

Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767 (1972-1973).

> any event only the probability that his case will succeed to warrant the bonded sequestration of the property pending outcome of the suit. The issue at this stage of the proceedings concerns possession pending trial and turns on the existence of the debt, the lien, and the delinquency.[33]

Justice White's narrowing of the scope of the hearing in *Mitchell* should not surprise those familiar with his dissent in *Fuentes*. Even there, he defined the hearing as an inquiry into "probable cause for asserting that default has occurred."[34] Justice Stewart refused to debate the point with him.[35]

The failure of the *Fuentes* Court to focus on the content of the pre-trial hearing is symptomatic of the confusion surrounding the definition of due process throughout the consumer credit field.[36] In part, the confusion stems from the rapid growth of the concept as the number of constitutionally protected property rights has increased.[37] While the Supreme Court has consistently taken the position that the content of due process varies with the interest at stake, there is an understandable tendency on the part of both courts and commentators to generalize a holding in a particular area to all others.[38] Any attempt to define due process in the context of consumer credit transactions must focus on both the content and the timing of the pre-trial hearing. At least three options present themselves for consideration. The most superficial inquiry would reach the existence of the debt, the lien, and the default.

---

33. 416 U.S. at 609 (citations omitted).
34. 407 U.S. at 102.
35. Justice Stewart's neglect of the difficult definitional problems led Justice White to conclude that *Fuentes* gave scant comfort to debtors.
> The Court's rhetoric is seductive, but in the end analysis, the result it reaches will have little impact and represents no more than ideological tinkering with state law. . . . It is very doubtful in my mind that such a hearing would in fact result in protections for the debtor substantially different from those the present law provide.

407 U.S. at 102-03.
36. As a measure of this confusion, defense counsel in *Mitchell* agreed to a standard of probable cause saying, "I am willing to concede any standard on prior hearing if you will just give me the hearing." 42 U.S.L.W. 3347 (U.S. Dec. 11, 1973). A hearing on these terms, as Justice White predicted in *Fuentes*, significantly increases the debtor's protection.
37. *See, e.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974) (employment); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); Lindsey v. Normet, 405 U.S. 56 (1972) (tenant's rights).
38. This tendency is most marked in those advocates of reform through due process who see it as the "great equalizer" of modern law and a tool for social reform. From this point of view, due process should not vary with the circumstances of each case but provide a constant quantum of protection.

Such a hearing would be purely factual and could occur either before or after seizure of the goods. Justice White supports this particular procedure. The second option includes a somewhat more extensive factual inquiry into the reasons for disturbing the status quo before the trial. The issue would be posed: Is there any proof of danger to the creditor's legitimate security interest that necessitates seizure of the goods pending trial on the merits. Such an inquiry would, of course, precede seizure of the property. Finally, a pre-trial hearing might provide the debtor with an opportunity to preview his defenses to a trial on the merits.

The second option—the inquiry into reasons for disturbing the status quo pending trial—appears to best accommodate the competing interests of both, debtor and creditor. As noted, such a hearing would necessarily precede any seizure of the goods. Thus, for those who, like Justice Rehnquist, fear that pre-seizure notice will afford debtors an opportunity for selling the property, the second option is not a reasonable alternative.[39] One advantage of this approach, however, lies in its recognition that resisting further payments is normally the only leverage a consumer debtor has;[40] at the same time, it acknowledges the creditor's legitimate concern for preserving his security interest.

In the end, the alternative chosen will reflect the varying views people have of the problems in the consumer credit industry. Critics of the present system point out that many consumers default, not because they are unwilling or unable to pay, but because default is often the consumer's most effective weapon in the battle against victimization by easy credit merchants and computer error.[41] Consumer advocates thus look to the guarantees of due process as another weapon in the arsenal. From this perspective, pre-seizure notice and hearing is essential; and, at the hearing, the debtor should be allowed to preview all his defenses relevant to the charge. For those however, who along with Justice Rehnquist, perceive greater danger in the ability of bad faith consumers to destroy or harm the creditor's security interest, *Mitchell*'s limited pre-trial possessory hearing will be sufficient to fulfill the promise of the fourteenth amendment.[42]

---

39. Arguably, such notice does not encourage debtors to sell the property any more than did the original default since every defaulting purchaser realizes that some action will be instituted eventually.
40. *See* Eovaldi & Gestrin, *Justice for Consumers: The Mechanisms of Redress*, 66 NW. U.L. REV. 281-5 (1971).
41. Clark & Landers, *supra* note 32, at 407.
42. During oral argument before the Court in *Mitchell*, Justice Rehnquist pointed out that "[n]otice and hearing also give an opportunity to debtors to spirit chattels away. Experience with this type of practice

It remains to be seen what *Mitchell*'s effect will be in the area of pre-judgment remedies.[43] While the decision does not purport to abandon the philosophy of *Sniadach* or *Fuentes*, it does indicate that the decision to grant summary seizures must be made on a case by case basis. Since *Mitchell* is based on an incomplete presentation of the facts, it is difficult to predict what the next creditor will have to show in order to justify a pre-hearing seizure. Thus, far from providing any guidelines for the lower courts, *Mitchell* has injected a new element of uncertainty into the whole area.

Penny Berger '75

shows that the stuff disappears." 42 U.S.L.W. 3345 (U.S. Dec. 11 1973). *See also* Mentschikoff, *supra* note 32. Part of the problem in identifying the evil has been the lack of a definitive study (or even agreement on the methodology to be applied) on the impact of reform on the price of credit.

43. The Court recently struck down a Georgia garnishment statute for failing to provide an early hearing at which a creditor would have to show probable cause, and because the garnishment order could be issued by a court clerk without participation by a judge. Although the decisions reach different results, both grounds for the Court's holding were adumbrated in *Mitchell*. North Georgia Finishing, Inc. v. Di-Chem, Inc., 43 U.S.L.W. 4192 (U.S. Jan. 21, 1975).